85-960

Supreme Court, U.S.
FILED
DEC 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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**JAMES R. COLSON,**

**Petitioner**

**v.**

**STATE OF MAINE,**

**Respondent**

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

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## QUESTION PRESENTED FOR REVIEW

1) Was Petitioner deprived of due process of law under the Fourteenth Amendment to the United States Constitution by the failure of the Maine District Court to advise him at his "show cause" hearing held pursuant to 17-A M.R.S.A. §1304 that, as an indigent, he had a right (A) to request that counsel be appointed to represent him and (B) to the appointment of counsel, prior to his incarceration for failing to pay a three hundred fifty dollar fine that had been assessed in a criminal case.

## PARTIES

The names of all parties to this proceeding are contained in the caption of the case.

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The opinion of the Maine Supreme Judicial Court is reported at 498 A.2d 585 (Me. 1985), and is attached to this Petition as Appendix A.

## JURISDICTION

(i) The date of the Maine Supreme Judicial Court judgment sought to be reviewed is October 2, 1985. It was entered on the same date.

(ii) The jurisdiction of this Court to review the judgment in question by writ of certiorari is invoked pursuant to 28 U.S.C. §1257(3) which states, in pertinent part,

> ". . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

### A. UNITED STATES CONSTITUTION, AMENDMENT XIV

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of its laws.

B. 17-A M.R.S.A. §1304 (1984)

§1304. Default in payment of fines

1. When a convicted person sentenced to pay a fine defaults in the payment thereof or of any installment, the court, upon the motion of the official to whom the money is payable, as provided in section 1303, or upon its own motion, may require him to show cause why he should not be sentenced to be imprisoned for nonpayment and may issue a summons or a warrant of arrest for his appearance. Unless such person shows that his default was not attributable to a wilful refusal to obey the order of the court or to a failure on his part to make

a good faith effort to obtain the funds required for the payment, the court shall find that his default was unexcused and may order him imprisoned until the fine or a specified part thereof is paid. The term of imprisonment for such unexcused nonpayment of the fine shall be specified in the court's order and shall not exceed one day for each $5.00 of the fine or 6 months, whichever is the shorter. When a fine is imposed on an organization, it is the duty of the person or persons authorized to make disbursements from the assets of the organization to pay it from such assets and failure so to do may be punishable under this section. A person imprisoned for nonpayment of a fine shall be given credit towards its payment for each day that he is in the custody of the department, at the rate specified in the court's order. He shall also be given

credit for each day that he has been detained as a result of an arrest warrant issued pursuant to this section.

2. If it appears that the default in the payment of a fine is excusable, the court may make an order allowing the offender additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or the unpaid portion thereof in whole or in part.

3. Upon any default in the payment of a fine or any installment thereof, execution may be levied, and such other measures may be taken for the collection of the fine or the unpaid balance thereof as are authorized for the collection of an unpaid civil judgment entered against a person. The levy of execution for the

collection of a fine shall not discharge a person imprisoned for nonpayment of the fine until such time as the amount of the fine has been collected.

## STATEMENT OF THE CASE

On December 17, 1981, Petitioner James R. Colson was charged with violating 29 M.R.S.A. §2184, i.e., the criminal traffic offense of operating a motor vehicle after licence suspension. At his arraignment on December 28, 1981 in Maine District Court, Colson entered a plea of guilty to what was then a Class E offense. Thus, under Rule 44 of Maine's District Court Rules of Criminal Procedure, appointment of counsel was not mandatory, even for an indigent.

The written record of Colson's arraignment, endorsed upon the Complaint, fails to affirmatively demonstrate that

the Court advised Colson of his right to be represented by counsel; nor does it show that he waived that right prior to entering his guilty plea.

Nevertheless, upon a finding of guilty, Colson was sentenced to pay a $350.00 fine, in four installments. Colson did not make the proscribed fine payments, and on May 12, 1982 the District Court authorized, sua sponte, the issuance of a bench warrant for Colson's arrest.

Colson was arrested on this warrant on February 4, 1983. On February 8, 1983, he was brought before the District Court, pursuant to 17-A M.R.S.A. §1304, to show cause why he should not be committed to jail for his failure to pay his fine. He was unrepresented.

At the time of this hearing, Colson was indigent. Yet the District Court did

not advise him that he had a right to be represented by counsel and that counsel would be appointed for him upon his request. Nor was Colson advised, minimally, that he could request that counsel be appointed for him.

Notwithstanding the absence of this advice and of Colson's waiver of his right to counsel, the District Court ordered Colson committed to the county jail to serve out his $350.00 fine at the rate of $10.00 per day.

Colson appealed this commitment order. However, in State v. Colson, 472 A.2d 1381 (Me. 1984), the Law Court held that an "order of commitment for nonpayment of a fine pursuant to 17-A M.R.S.A. §1304 is reviewable only on post-conviction review, and not on direct appeal from that order." Id., at 1382.

Following the Law Court's decision in State v. Colson, Petitioner proceeded with a Petition for Post-Conviction Review which he had filed in the Cumberland County Superior Court on February 16, 1983. Proceedings upon this Petition had been automatically stayed by virtue of 15 M.R.S.A. §2126 until the determination of the appeal in State v. Colson. An evidentiary hearing was held on August 3, 1984.

By decision dated November 28, 1984, the Superior Court denied the Petition for Post-Conviction Review. While finding that the Petitioner was indigent at the time of the §1304 hearing, the Court held that the §1304 hearing:

> "is a straight forward, non-adversarial procedure in which an individual has the opportunity to explain why he has refused to abide by the order of the court and that he has made a good faith effort to pay the fine. The presence of court-appointed

> counsel in this type of proceeding would be of little, if any, benefit to the petitioner but would be a heavy burden on the fiscal and administrative resources of the State."

Upon the Petitioner's timely Notice of Appeal and Memorandum, a Certificate of Probable Cause issued from the Supreme Judicial Court of Maine on January 4, 1985. By decision dated October 2, 1985, the Law Court affirmed the denial of the Petition for Post-Conviction Review. It held that Colson had a diminished interest in his personal liberty at the time of his §1304 hearing because he previously had been convicted of a crime and sentenced to pay a fine.

In the absence of a presumption in favor of court-appointed counsel pursuant to Lassiter v. Department of Social Services, 452 U.S. 18 (1981), the Law Court ruled that appointed counsel was unnecessary in light of (1) the

relatively simple and non-adversarial nature of the §1304 hearing and (2) a statutory framework which militated against the commitment of an indigent. Colson v. State of Maine, 498 A.2d 585, 589 (Me. 1985).

The Law Court did not hold that the Petitioner should have been minimally advised of this right to request counsel at the §1304 hearing.

## RAISING OF FEDERAL ISSUES

Materials required by Rule 21.1 (h) are set forth in Appendix C.

## REASONS FOR GRANTING THE WRIT

This case presents the Court with the opportunity of settling an important question of federal law which has been decided in various ways by state courts of last resort, i.e., whether an indigent person found in "civil" contempt of court may be imprisoned in the absence of court-appointed counsel. The Circuit Courts of Appeal which have looked at the question agree that court-appointed

counsel is required in such circumstances.[1]

Among the states, the majority view agrees with that enunciated by the Federal Courts of Appeal.[2]

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1 Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985) (non-support); Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984) (non-support); Ridgway v. Baker, 720 F.2d 1409 (5th Cir. 1983) (non-support); Nordgren v. Mitchell, 716 F.2d 1335 (10th Cir. 1983) (non-support); U.S. v. Anderson, 553 F.2d 1154 (8th Cir. 1977) (failure to produce records); In Re DiBella, 518 F.2d 955 (2d Cir. 1975) (refusal to answer grand jury questions); In Re Kilgo, 484 F.2d 1215 (4th Cir. 1973) (refusal to answer grand jury questions); Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973) (non-support).

2 Rutherford v. Rutherford, 464 A.2d 228 (Md. 1983) (non-support); McNabb v. Osmundson, 315 N.W.2d 9 (Iowa 1982) (non-support); People v. Johnson, 283 N.W.2d 632 (Mich. 1979) (refusal to testify before grand jury); Ferris v. State ex rel. Maass, 249 N.W.2d 789 (Wisc. 1977) (failure to obey order of Dept. of Nat. Resources); Snoot v. Dingess, 236 S.E.2d 468 (W. Va. 1977) (failure to pay alimony arrears) (dicta); Tetro v. Tetro, 544 P.2d 17 (Wash. 1975) (non-support) Otton v. Zaborac, 525 P.2d 537 (Alas. 1974) (non-support).

The minority view, of which the State of Maine in now an adherent, would allow an indigent court-appointed counsel only if the civil contempt proceeding were sufficiently complex to require the abilities of an attorney.[3]

Maine's Supreme Judicial Court in the case at bar relied upon two extremely tenuous propositions in adopting the minority view.

First, it held that the Petitioner held a "diminished interest" in his personal liberty at the time of his §1304 hearing by virtue of his prior conviction

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[3] Andrews v. Walton, 428 So.2d 663 (Fla. 1983) (indigent parent in non-support case may not be imprisoned, thus court-appointed counsel unnecessary); State ex rel. Dept. of Human Services v. Rael, 642 P.2d 1099 (N.M. 1982) (non-support); Jolly v. Wright, 265 S.E.2d 135 (N.C. 1980) (non-support); Sword v. Sword, 249 N.W.2d 88 (Mich. 1976) (non-support); Duval v. Duval, 322 A.2d 1 (N.H. 1974) (non-support).

of a crime and sentence to pay a $350.00 fine.

Inherent in this position is the premise that Colson's liberty following his conviction was conditioned upon payment of his fine; thus the Law Court relied upon Gagnon v. Scarpelli, 411 U.S. 778 (1973) in finding no presumption in favor of court-appointed counsel.

The fallacy in this reasoning, as pointed out by Justice David A. Nichols in his dissenting opinion below, is that the conditional liberty found in Gagnon flowed from the probationer's prior conviction and suspended sentence of incarceration as well as from the express terms of probation to which he had agreed.

In Colson's case, there was no jail sentence, suspended or otherwise, and no probation.

The Law Court's decision implies that Colson, as an indigent, is presumed to h[illegible]own the law pertaining to §1304 commitments, which proceedings could have the effect of depriving him of his freedom.

To this extent, Colson was not unlike any citizen at large whose continued liberty may involve adhering to the law. Thus, there is no distinction of constitutional significance between Colson, who had been convicted of a crime, and sentenced only to pay a fine, and a defendant who has been "merely" accused of a crime. At the time of his §1304 hearing, Colson stood before the District Court "merely" accused of a wilful refusal to pay.

The Law Court's second error in analysis involves its reliance upon Maine's statutory framework to minimize

the risk that persons similarly situated to Colson will be incarcerated if they are indigent.

In developing this train of thought, the Law Court grievously confused the argument presented to it by Colson. While it is true that Colson waived the factual issue of whether his failure to pay his fine was "excusable" under §1304, Colson did in fact argue that his own incarceration was illegal.

The illegality stemmed from his indigency. Although he admitted being able to pay his fine at some point in time between December, 1981 and February, 1983, at the time of his §1304 hearing Colson was indigent and hence unable to comply with the purging provisions of §1304 by which he held the keys to his confinement upon payment of the unpaid balance of his fine.

Thus, the Law Court failed to perceive this critical distinction between a past "unexcused" failure to pay and a present "inability" to pay. Only the former aspect is dealt with by §1304.[4]

In fact, the net result of the Law Court's opinion in this case is to increase the liklihood that erroneous incarcerations of indigents will occur at §1304 hearings. The Law Court ignored its own precedent of Wells v. State,[5] barring the commitment of a debtor who was unable to presently comply with a court-ordered payment; misconstrued

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[4] The Law Court's statement at 498 A.2d 588 that "[t]he statutory restrictions of a section 1304 hearing remove the need of an attorney to protect one from imprisonment due to an inability to pay" evidences that Court's lack of focus upon the question of present "inability" to pay.

[5] 474 A.2d 846 (Me. 1984)

Colson's emphasis upon his own present inability to pay, as opposed to his past ability to pay; and utterly failed to consider whether Colson was in a position to comply with the purging provisions of §1304.

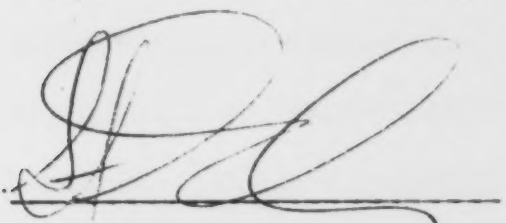
Presumably, if Colson had had an attorney at his §1304 hearing, counsel would have informed the District Court that incarceration would be illegal given his client's indigency. Certainly, without such counsel, the risk of erroneous deprivations of liberty at §1304 hearings in Maine is currently a probability.

## CONCLUSION

For the foregoing reasons, Petitioner prays that his Petition for a Writ of Certiorari be granted.

Date: December 2, 1985

Respectfully submitted,



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MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 3920
Law Docket No. Cum-84-476

JAMES R. COLSON

v.

STATE OF MAINE

Argued May 7, 1985
Decided October 2, 1985

Before McKUSICK, C.J., NICHOLS, ROBERTS, VIOLETTE, WATHEN, and SCOLNIK, JJ.

ROBERTS, J.

James R. Colson appeals from a judgment of the Superior Court, Cumberland County, denying his petition for post-conviction review, 15 M.R.S.A. §§2121-2132 (Supp. 1984). Colson alleges that procedural due process under the Fourteenth Amendment of the United States Constitution and article I, section 6-A of the Maine Constitution requires that an indigent defendant have a right to court-appointed counsel in a hearing

necessitated by his failure to pay a fine previously imposed. We affirm the Superior Court's denial of Colson's petition.

I.

On or about December 28, 1981, Colson was convicted in District Court of operating a motor vehicle after suspension of his license, 29 M.R.S.A §2184 (1978 & Supp. 1984). He was fined $350.00 and ordered to pay that amount in monthly installments on dates that Colson requested. The last payment of $50.00 was due on May 3, 1982. On February 8, 1983 a hearing pursuant to 17-A M.R.S.A.

§1304 (1983)[1] was conducted. At the

[1] 17-A M.R.S.A. §1304 (1983) provides in pertinent part

> 1. When a convicted person sentenced to pay a fine defaults in the payment thereof or of any installment, the court, upon the motion of the official to whom the money is payable, as provided in section 1303, or upon its own motion, may require him to show cause why he should not be sentenced to be imprisoned for nonpayment and may issue a summons or a warrant of arrest for his appearance. Unless such person shows that his default was not attributable to a wilful refusal to obey the order of the court or to a failure on his part to make a good faith effort to obtain the funds required for the payment, the court shall find that his default was unexcused and may order him imprisoned until the fine or a specified part thereof is paid. The term of imprisonment for such excused nonpayment of the fine shall be specified in the court's order and shall not exceed one day for each $5 of the fine or six months, whichever is the shorter. ...
>
> 2. If it appears that the default in the payment of a fine is excusable, the court may make an order allowing the offender additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or the unpaid portion thereof in whole or in part.

conclusion of the proceedings, Colson was committed to the county jail until the fine was paid with credit at $10 per day for the time served. The record discloses neither a request for, nor a waiver of, court-appointed counsel at the section 1304 hearing.

On or about February 9, 1983, Colson appealed to the Superior Court from the District Court's judgment and order of commitment. The commitment was stayed and Colson was admitted to bail by the District Court. The Superior Court affirmed the judgment on August 16, 1983, and notice of appeal to this Court was filed on September 1, 1983. In State v. Colson, 472 A.2d 1381 (Me. 1984), however, we dismissed Colson's appeal, ruling that an "order of commitment for nonpayment of a fine pursuant to 17-A M.R.S.A. §1304 is reviewable only on

post-conviction review, and not on direct appeal from that order." Id. at 1382.

At the post conviction proceeding and at oral argument before us, Colson, through his appointed counsel, expressly waived two issues: (1) whether the District Court correctly inquired of his ability to pay the fine when originally imposed as mandated by 17-A M.R.S.A. §1302 (1983);[2] and (2) whether his default in payment of the fine was "excusable" pursuant to the language of section 1304. Colson thus seeks to

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[2] 17-A M.R.S.A. §1302 (1983) provides

> No convicted person shall be sentenced to pay a fine unless the court determines that he is or will be able to pay the fine. In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the offender and the nature of the burden that its payment will impose. No person shall be imprisoned solely for the reason that he will not be able to pay a fine.

isolate the constitutional issue raised by his petition, and thereby to present the narrow question whether the absence of court-appointed counsel in a section 1304 proceeding constitutes a per se violation of his constitutional rights. We decline to adopt such an absolute rule in this case.

II.

Colson urges that Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), which held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial, "dictates that he must be allowed the appointment of counsel before he can be committed to jail for his failure to pay a fine. He

acknowledges that Argersinger was decided in the context of the trial stage of a criminal prosecution,[3] but he argues that In re Gault, 387 U.S. 1, 41 (1967), removes any distinction between "civil" and "criminal" cases in assessing right

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[3] The Argersinger court stated in pertinent part

> The trial of vagrancy cases is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions.
>
> ....
>
> Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

407 U.S. at 33, 34. The logic of the Argersinger opinion is inapplicable to the narrow confines of a "show cause" hearing under §1304.

to counsel issues.[4] In re Gault, however, involved a juvenile court proceeding where the issue was whether the child would be found to be "delinquent" and subjected to the loss of his liberty by being committed to a state

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4 Cf. Meyer v. Meyer, 414 A.2d 236 (Me. 1980), in which we held that the defendant was not denied due process of law where he was not given assistance of court-appointed counsel in a support payment arrearage and contempt proceeding because the contempt was civil in nature rather than criminal.

institution and is therefore inapposite to the case at bar.[5]

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[5] In re Gault dealt with a juvenile delinquency and an offense that, if committed by an adult, would have carried a fine of $5 to $50 or imprisonment in jail for not more than two months, but when committed by a juvenile could lead to his detention in a state institution until he reached the age of 21. The Supreme Court stated:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step of the proceedings against him."

387 U.S. at 36 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)). We are unpersuaded by the Gault language because of the contrast between the relatively complex nature of the proceeding in that case and the straightforward nature of the section 1304 proceeding in the case at bar.

III.

Colson next urges that the decision in Lassiter v. Department of Social Services, 452 U.S. 18 (1981), mandates the necessity for appointment of counsel for indigents in contempt-like proceedings held pursuant to section 1304. In Lassiter the Supreme Court declined to order the appointment of counsel in every parental rights termination proceeding, although the Court did discuss a [sic] counsel only when, if he loses, he may be deprived of his physical freedom. Id. at 27. Colson reasons that Gagnon v. Scarpelli, 411 U.S. 778 (1973), which held that there is no absolute right to appointed counsel in probation revocation proceedings, in part because of a probationer's already diminished interest in personal liberty, does not compel a contrary result. He

contends that because he was not sentenced to imprisonment or subjected to conditions of probation, but only ordered to pay a $350 fine, he had an "undiminished" interest in his personal freedom at the time of his section 1304 hearing, and therefore a right to appointed counsel.

Without determining the precise quantum of Colson's right to due process, we note that he had already been convicted of a crime and therefore was not entitled to the process accorded one merely accused of a crime. Colson's conviction resulted in an order to pay $350 upon a schedule that he requested. Although the sentence did not include imprisonment, the imposition of a fine exposed Colson to incarceration pursuant to section 1304 for unexcused default in payment. Thus Colson was deprived only

of the conditional liberty dependent upon payment of the fine as ordered. See Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

IV.

Finally, Lassiter adopted the due process balancing test enunciated in Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976), in which private interests, governmental interests, and the risk that the procedure used will lead to erroneous

decisions are considered.[6] Colson argues that the private interest at stake, freedom from incarceration, outweighs the state's interest in maintaining the simplified section 1304 procedures. He

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[6] The Lassiter Court noted the distinction between "absolute liberty" and "conditional liberty" discussed in Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Morrissey v. Brewer, 408 U.S. 471 (1972), and suggested a presumption that the right to appointed counsel arises only when an indigent litigant may be deprived of absolute liberty. The presumption must be measured against the three other elements in the due process decision outlined in Mathews:

> [Mathews] propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

Lassiter, 452 U.S. at 27.

urges that a lawyer's assistance would ensure that a convicted indigent would not be imprisoned solely for financial inability to pay a fine. Second, he reasons that the risk of an erroneous determination at a section 1304 hearing is enhanced because the State, acting through both its executive and judicial arms, is the moving party.

The criminal code itself insures that a convicted indigent will not be imprisoned solely for a financial inability to pay a fine. Section 1302 prohibits imposition of a criminal fine unless the court determines that the convicted person has the ability to pay it. Moreover, section 1304(2) permits the court to order imprisonment only when the convicted person's failure to pay the

fine is found to be unexcused.[7] The statutory restrictions of a section 1304 hearing remove the need of an attorney to protect one from imprisonment due to an inability to pay. Indeed, the only stage of a section 1304 hearing at which an attorney could offer assistance would be a determination under subsection 1304(1) whether the petitioner's failure to pay was excusable. The mechanics of a section 1304 hearing, however, are not so legally complex that due process should require an unqualified right to an attorney's assistance.[8] In Gagnon v. Scarpelli, 411 U.S. 778, 788 (1973), the

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[7] Otherwise, the court's options are limited to an order allowing additional time to pay, reducing the amount to be paid or revoking the fine in part or altogether.

[8] We note, for example, the absence of any direct appeal from section 1304 procedures. The need for an attorney's skills in preserving error for appellate review is therefore absent.

Supreme Court opined that there is no automatic constitutional right to counsel at a probation revocation hearing. The complexities of each case must be examined to determine the necessity of a counsel's assistance. Given the straight-forward nature of the section 1304 hearing, the court should not ordinarily encounter substantial complexities. Serious departures from substantial justice may be appropriately handled on post-conviction review. Moreover, contrary to Colson's assertion, a section 1304 hearing is not, strictly speaking, an adversary proceeding.[9]

Applying the factors set forth in Mathews, we hold that in these

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[9] Cf. Danforth v. State Department of Health and Welfare, 303 A.2d 794 (Me. 1973) (attorney assigned to indigent parents in civil neglect proceeding because full panoply of traditional weapons of state are marshalled against defendant parents).

circumstances Colson did not have a right to court-appointed counsel because he had already been convicted of a crime. The risk of improper incarceration due to lack of counsel was minimal. Indeed, Colson's counsel does not seek to demonstrate that Colson was in fact illegally incarcerated. Finally, we do not say that appointed counsel will never be required in a section 1304 hearing. Rather, the simplified procedure and absence of complex issues involved in such hearings will normally obviate the need for appointed counsel.

Accordingly, the entry is:

Judgment affirmed.

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McKusick, C.J., Violette, Wathen, and Scolnik, J.J., concurring.

NICHOLS, J., dissenting

I respectfully dissent. I cannot agree with today's majority when they declare that, even if indigent, James R. Colson had no right to counsel at the 17-A M.R.S.A. §1304 proceeding where, after he had failed to pay the fine imposed upon him, the District Court decided that his default was inexcusable and committed Colson to jail. Neither can I accept the majority's views that the §1304 hearing was "not an adversary proceeding" and that it was not a complex one. Most emphatically of all, I reject the inference that with his liberty at stake Colson's right to procedural due process under both state and federal constitutions should somehow be weighed against the expense to the State of providing him with counsel.

At the threshold it must be observed that the §1304 hearing is not some administrative process. It is a court hearing on a motion -- either that of the official to whom the fine was payable or the court's motion -- and is no less adversarial than any other show cause proceeding in that court. At this critical juncture a defendant needs the skill of counsel, first to present relevant facts as effectively as the adverse facts are being presented by the party moving against him, next to marshall any viable defense, and finally, where appropriate, to urge on the court a defendant's eligibility for probation or unconditional discharge pursuant to 17-A M.R.S.A. §1201 et seq. Rare indeed is the impecunious defendant who, perhaps with incarceration imminent, knows the

relevant law and can effectively act as his own advocate in such a setting.[1]

Under section 1304, the District Court must conclude whether a defendant has shown that his "default was not attributable to a wilful refusal to obey the order of the court or to a failure on his part to make a good faith effort to obtain the funds required for the payment." The mere recitation of what one has, or does not have, for cash in his pocket is not the entire answer. An indigent defendant is not likely to

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1 It may be observed in passim that the Maine Standards for Criminal Justice 5.18(3) declare it to be the duty of defense counsel to familiarize himself with sentencing alternatives and to "recommend that sentence which most accurately meets the needs of his client and enhances his liberty." The comparative study of these standards and the A.B.A. Standards for Criminal Justice was "accepted" by the Maine Judicial Council February 14, 1975, but apparently was not acted upon by the Supreme Judicial Court.

understand the legal decision the court must make, and he may not

> present information about efforts to find employment, general employability, total available resources, and the way these resources were spent in the past. An attorney, understanding the significance of this information, can help the client ferret out the information. An attorney also can document employment difficulties, consult experts if necessary, and explain how [the defendant] has used his available resources in the past.

Hermann and Donahue, Fathers Behind Bars: The Right to Counsel In Civil Contempt Proceedings, 14 New Mex. L. Rev. 275, 307 (1984).

Likewise, I differ with those who would argue that because no direct appeal from the section 1304 hearing is authorized by statute there is no need for an attorney's skills in preserving a record of error. I submit that the lack of a direct appeal leads to the opposite conclusion; it emphasizes the importance

of careful preparation and full presentation of both facts and law to the court at this hearing.[2]

Indeed section 1304 may sometimes operate in a manner closely resembling that of a civil contempt statute. If at the time of the show cause hearing a defendant has the funds to pay his past-due fine, the coercive nature is evident in that he may be imprisoned if he presents no acceptable excuse for his default. However, he would have the essential right to purge because he could only be imprisoned "until the fine or a specified part thereof is paid." 17-A M.R.S.A. §1304 (emphasis added); see Wells v. State, 474 A.2d 846, 850 (Me. 1984). By contrast, a person who at the

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2 It should not be overlooked that resort to a show cause proceeding does not relieve the movant of his ultimate burden of proof. Brennan v. Johnson, 391 A.2d 338, 339, fn.1 (Me. 1978).

time of this hearing is indigent does not, by definition, "hold the keys to his own cell." Thus, for the indigent in such situations, only the criminal aspect of punishment is implicated when he is imprisoned. Another criminal aspect of a section 1304 hearing is that it is a consequence of an earlier criminal prosecution.

In Meyer v. Meyer, 414 A.2d 236 (Me. 1980), we found no right to counsel at state expense in a civil contempt proceeding, but, citing Danforth v. State Dep't of Health and Welfare, 303 A.2d 794 (Me. 1973), we noted that the Meyer proceeding had not been initiated by the State. Id. at 238. Under section 1304 either the court or the official to whom the fine is payable is the moving party Notwithstanding that distinction, the courts of the majority of jurisdictions

hold that the right to counsel attaches in civil contempt proceedings involving actual incarceration.[3]

In sum, on this novel issue I reject today's opinion as denying Colson the procedural due process which is guaranteed him both by the Maine Constitution, art. I, section 6-A, and by the counterpart provision of the federal constitution. We have had occasion to observe that due process is a "flexible concept . . . with the ultimate objective of guaranteeing fairness in all judicial actions." Danforth, 303 A.2d at 797.

The "balancing" analysis of Lassiter v. Department of Social Services, 452 U.S. 18 (1981), invoked by today's majority, was set forth in light of the possible termination of parental rights

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3 See Rutherford v. Rutherford, 464 A.2d 228, 235 (Md. App. 1983) (citations to federal and state cases).

and did not involve the deprivation of one's physical liberty. Accordingly, the Lassiter court adopted the Mathews v. Eldridge, 424 U.S. 319, 335 (1975), test for determining the requirements of due process, but the Mathews decision also did not involve the deprivation of physical liberty. The United States Supreme Court in the latter case had before it the narrow issue of due process rights in an initial termination of Social Security disability benefits. Therefore, both Lassiter and Mathews are clearly inapposite. For a like analysis of these two cases, see McNabb v. Osmundson, 315 N.W.2d 9, 12 (Iowa 1982) (indigent charged with contempt for non-payment of child support).

To Colson's argument that at the time of his section 1304 hearing he had an "undiminished" interest in his

personal freedom the Court's response is equally weak in its statement that Colson had already been convicted of a crime and therefore was not entitled to the process accorded one merely accused of a crime. When Colson was convicted of operating a motor vehicle after suspension of his license in District Court he was ordered to pay $350 in four installments. At that point Colson's interest in his personal freedom was undiminished -- he had not been sentenced to prison nor had he been placed on probation. The fact of conviction does not, standing along, bear on his liberty.[4]

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4 The reasoning of Gagnon v. Scarpelli, 411 U.S. 778 (1973), leading ultimately to the conclusion that under the federal constitution there is no absolute right to counsel in probation revocation proceedings, was based on the critical fact that the probationer, on a conditional sentence suspension, held a diminished interest in his personal liberty.

Far more persuasive, I suggest, are the United States Supreme Court's opinions in Argersinger v. Hamlin, 407 U.S. 25 (1972) and Scott v. Illinois, 440 U.S. 367 (1979) than those relied on by today's majority, which opines that Argersinger is not applicable to the show cause hearing under section 1304. When we observe that the features of that hearing are very similar to a contempt proceeding, it is difficult to see how the rule of Argersinger could be dismissed so blithely. A number of federal courts have relied on Argersinger in declaring that an indigent who might be imprisoned for civil contempt must be afforded counsel. See, e.g., United States v. Anderson, 553 F.2d 1154, 1156 n.2 (8th Cir. 1977); In re DiBella, 518 F.2d 955, 959 (2d Cir. 1975); In re

Kilgo, 484 F.2d 1215, 1221 (4th Cir. 1973).

In Scott, moreover, the United States Supreme Court explicitly attempted to "resolve a conflict among state and lower federal courts regarding the proper application of [the] decision in Argersinger." 440 U.S. at 368. The Scott court made clear that in determining whether there is a constitutional right to appointment of counsel the line is to be drawn at actual imprisonment. Id. at 373-74.

The actual imprisonment of Colson at this hearing is a penalty different in kind from the fine which was imposed on him in the earlier District Court disposition of his case. Given the context of Colson's case, our Court does not need to extend its holding beyond the

actual imprisonment standard, and I do not propose to go further.[5]

The majority, on its part, has failed to offer any rationale for rejecting the actual imprisonment standard announced in Scott. On my part, I would adopt that standard. Procedural due process required, I submit, that if Colson had been found indigent he would have been entitled to counsel at the §1304 hearing where he was sent off to jail.

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5 Notwithstanding that this is a procedural due process case, we should not overlook the protection afforded indigent defendants by the Sixth Amendment decisions of the United States Supreme Court because in actual imprisonment cases that Court appears to make no distinction between a Sixth Amendment right to counsel and Fourteenth Amendment right to counsel. Illustratively, see Mempa v. Rhay, 389 U.S. 128 (1967) (counsel must be afforded at a deferred sentencing).

STATE OF MAINE — SUPERIOR COURT
Criminal Action
CUMBERLAND, ss. — Docket No. CR83-233

JAMES R. COLSON,
Petitioner

v.

STATE OF MAINE,
Respondent

ORDER

This matter is before the court on James R. Colson's post-conviction review petition. On or about December 28, 1981, the petitioner was convicted in District Court of operating a motor vehicle after suspension of his license pursuant to 29 M.R.S.A. §2184 and was fined $350. The petitioner did not pay the $350, a bench warrant was issued, and he was arrested on February 14 [sic], 1983. On February 8, 1983, a 17-A M.R.S.A §1304 (1983) hearing was conducted and, at the conclusion of the proceedings, the

petitioner was ordered committed to the county jail for 35 days at $10 per day.

On or about February 9, 1983, the petitioner filed an appeal in this court from the District Court's judgment and order of commitment. This appeal was denied on August 16, 1983, and notice of appeal to the Law Court from this denial was timely filed on September 1, 1983. In State v. Colson, 472 A.2d 1381 (1984), the Law Court denied the appeal on the ground that an "order of commitment for nonpayment of a fine pursuant to 17-A M.R.S.A. §1304 is reviewable only on post-conviction review, and not on direct appeal from that order." Id. at 1382.

Prior to filing the appeal to the Law Court, the petitioner filed a petition for post-conviction review in this court pursuant to 15 M.R.S.A. §§2121-2132 (Supp. 1983-84). The

petition, which was automatically stayed pending the appeal to the Law Court, is now before this court.

The narrow issue presented to the court is [sic] this post-conviction petition is whether procedural due process under the Fourteenth Amendment of the United States Constitution requires that an indigent defendant have a right to court-appointed counsel in a 17-A M.R.S.A. §1304 hearing. The factors to be evaluated in deciding whether due process requires appointment of counsel are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest though the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute counsel procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

A 17-A M.R.S.A. §1304 hearing is designed to give a convicted person sentenced to pay a fine the opportunity to "show cause why he should not be sentenced to imprisonment for nonpayment" of the fine. It is a straight forward, non-adversarial procedure in which an individual has the opportunity to explain why he has refused to abide by the order of the court and that he has made a good faith effort to pay the fine. The presence of court-appointed counsel in this type of proceeding would be of little, if any, benefit to the petitioner but would be a heavy burden on the fiscal and administrative resources of the State. Counsel would only give legal advice, not fiscal advice. An appropriate hearing was held and was

sufficient in all respects even with legal counsel not present for defendant.

Therefore, the entry is:

The court orders that the petition be DENIED.

Dated: November 28, 1984.

/s/
Sumner J. Goffin, Justice
Superior Court

STATE OF MAINE
CUMBERLAND, SS.

DISTRICT COURT
DISTRICT NINE
DIV. OF SO. CUMB.
Crim. Doc. No.
81-CR-33574

| | |
|---|---|
| STATE OF MAINE,<br>Plaintiff<br>vs.<br>JAMES R. COLSON,<br>Defendant | STATEMENT<br>OF<br>EVIDENCE |

Now comes the Defendant pursuant to Rule 39, M.D.C.R.Cr.P., and submits the following statement of evidence, stating in support thereof as follows:

1. Defendant was brought before this court on the morning of February 8, 1983, pursuant to Sec. 1304 of Title 17-A M.R.S.A. Defendant had been arrested on February 4, 1983 pursuant to an outstanding bench warrant issued for his failure to pay a $350.00 fine.

2. The State was unrepresented at said Sec. 1304 hearing. No electronic recording was made of the hearing.

3. Prior to ordering the Defendant committed to jail on February 8, 1983, the Court did not advise him that he had a right to be represented by an attorney, or that, were he indigent, the court would appoint an attorney to represent him.

4. The court did not advise the Defendant at this time that he could request that counsel be appointed to represent him.

5. The court made no inquiry as to Defendant's status as an indigent at this time.

6. The Defendant did not affirmatively waive his right to request counsel and/or to be represented by counsel at said Sec. 1304 hearing.

Respectfully submitted,

/s/
Stanley Greenberg
Attorney for Defendant

Date: February 15, 1983.

CERTIFICATE OF SERVICE

I hereby certify that I have served a conformed copy of the above Statement of Evidence by mailing a conformed copy to Jon Chapman, Asst. D.A., 142 Federal Street, Portland, Maine 04112, postage pre-paid.

/s/
Stanley Greenberg
Attorney for Defendant

Greenberg & Greenberg
443 Congress Street
Portland, Maine 04101

March 8, 1983

The Court approves and settles Defendant's Statement by Evidence as indicated below:

Paragraph 1 should in addition add, the failure to pay was at a date requested by defendant and when date arrived at he failed to appear to request an extension which is usually given.

Paragraphs 2 and 3 are true except in paragraph 3 it should be noted defendant was informed as to his rights when arraigned originally.

Paragraph 4 is true.

Paragraph 5 is not true as his financial status was questioned.

Paragraph 6 is true.

Millard Emanuelson
Judge, District Court

## RAISING OF FEDERAL QUESTIONS

A. PETITIONER'S PETITION FOR POST-CONVICTION REVIEW, FILED IN SUPERIOR COURT.

. . . .

At my commitment hearing on February 8, 1983, The District Court did not advise me, prior to imposing sentence upon me, that I had a right to be represented by an attorney, and that if I were indigent, that the court would appoint an attorney to represent me. Nor was I told that I could request that counsel be appointed to represent me.

I did not request counsel at my show cause hearing because I did not know that I had a right to request an attorney. Nor did I at any time waive my right to request counsel or to be represented by counsel.

. . . .

B. PETITIONER'S PRINCIPAL BRIEF, FILED IN SUPERIOR COURT

. . . .

In whatever manner the Sec. 1304 proceeding is labelled, an indigent Defendant must be allowed the appointment of counsel, in the absence of an effective waiver, before he can be committed to jail for his failure to pay a fine. Since Appellant was so incarcerated without the benefit of counsel, the District Court's order of commitment must be vacated.

This conclusion is compelled by Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) which held that "...absent a knowing and intelligent waiver, no person may be impr'soned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."

While is [sic] is true that Argersinger was decided in the context of a criminal prosecution, In Re Gault, 387 U.S. 1, 41 (1967) teaches that the distinction between "civil" and "criminal" cases is of no consequence in assessing the right to counsel in those circumstances where a person is deprived of his liberty. That landmark decision, providing constitutional safeguards in juvenile adjudication proceedings, applies with full force to a "civil" contempt proceeding, such as that under Sec. 1304, as a result of which, a defendant is incarcerated.

The necessity of counsel in this type of "civil" proceeding has been recently underscored by Lassiter v. Department of Social Services, 452 U.S. 18 (1981). While the Supreme Court in that case declined to order the

appointment of counsel in every parental rights termination proceeding, it did indicate that its precedents yield a "...presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical freedom" Id., at 27. (Emphasis supplied).

The litigant in Gagnon had been previously sentenced to a term of incarceration and placed on probation. In this case, Appellant Colson was never previously sentenced to any term of imprisonment, only to a $350.00 fine. He stands before this Court with an "undiminished" interest in his personal freedom. Moreover, Gagnon recognized that even in probation revocation proceedings, the probationer is entitled to be informed of his right to request counsel, which request is to be granted

only on a case by case basis. Gagnon, supra at 790. In this case, Colson was not so advised.

Where there is such an "undiminished interest" in freedom, under Lassiter, it is unnecessary for this Court to undertake the due process balancing test enunciated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976) in which private interests, governmental interests, and the risk that the procedure used will lead to erroneous decisions, are weighed. Where an indigent litigant, civil or criminal, is deprived of his freedom, and he has an indiminished interest in that freedom, he has an absolute due process right to appointed counsel.

However, if the Eldridge analysis were undertaken in this case, the conclusion would be the same. Mastin v. Fellerhoff, 526 F. Supp. 969 (S.D. Ohio

1981) (contempt for failure to pay child support); Young v. Whitworth, 522 F. Supp 759 (S.D. Ohio 1981) (also non-support). This is especially true here because the resources and power of the State, acting through both its executive and judicial arms, is the moving party in a Sec. 1304 hearing at which the Rules of Evidence apply. Rule 1101, Maine Rules of Evidence. Cf., Brotzman v. Brotzman, 283 N.W.2d 600 (Wisc. 1979) (failure to pay child support; action initiated by State's attorney); People v. Johnson, 283 N.W.2d 632 (Mich. 1979) (refusal to testify before grand jury).

C. CUMBERLAND COUNTY SUPERIOR COURT ORDER DENYING THE PETITION FOR POST-CONVICTION REVIEW, DOC. NO. CR-83-233.

. . . .

The narrow issue presented to the court is [sic] this post-conviction petition is whether procedural due process under the Fourteenth Amendment of the United States Constitution requires that an indigent defendant have a right to court-appointed counsel in a 17-A M.R.S.A. §1304 hearing.

. . . .

The Court orders that the Petition be DENIED.

. . . .

D. BRIEF OF THE APPELLANT, FILED IN THE SUPREME JUDICIAL COURT.

. . . .

Moreover, Gagnon recognized that even in probation revocation proceedings, the probationer is entitled to be informed of his right to request counsel, which request may be granted on a case by

case basis. Gagnon, supra, at 790. In this case, Colson was not so advised.

. . . .

II. THE SUPERIOR COURT MISAPPLIED THE TEST OF MATHEWS v. ELDRIDGE.

If the Eldridge analysis were undertaken in this case, Petitioner would still be entitled to counsel. Mastin v. Fellerhoff, 526 F. Supp. 969 (S.D. Ohio 1981) (contempt for failure to pay child support); Young v. Whitworth, 522 F. Supp. 759 (S.D. Ohio 1981) (also non-support). Cf., Lake v. Speziale, 580 F. Supp. 1318, 1340 (D. Ct. 1984). The private interest at stake, i.e., freedom from incarceration, far outweighs whatever interest the State has in maintaining the loose procedures which govern Sec. 1304 proceedings today. This is especially true given the significant risk that the lack of counsel at the Sec.

1304 [hearing] will lead to erroneous incarcerations. An indigent person at a Sec. 1304 hearing, if such a hearing is a "civil" contempt proceeding, may not be incarcerated simply because of a past ability to pay the fine and a past refusal to pay. Wells v. State, 474 A.2d 846, 851-852 (Me. 1984); Elzey v. Elzey, 435 A.2d 445 (Md. 1981). There must be a present ability to comply with the purging provisions of the court's order.

Yet, despite his indigency on February 8, 1983, Colson was ordered committed by the District Court. Had counsel been present at the Sec. 1304 hearing, he would have informed the court that such incarceration would deprive Colson of due process of law. Cf., Rutherford v. Rutherford, 464 A.2d 228 (Md. 1983).

The risk of an erroneous determination at the Sec. 1304 hearing is also enhanced because the resources and power of the State, acting through both its executive and judicial arms, is the moving party in a Sec. 1304 hearing at which the Rules of Evidence apply. Rule 1101, Maine Rules of Evidence. Cf., Brotzman v. Brotzman, 283 N.W.2d 600 (Wisc. 1979) (failure to pay child support; action initiated by State's attorney); People v. Johnson, 283 N.W.2d 632 (Mich. 1979) (refusal to testify before a grand jury).

Moreover, an indigent who appears at a Sec. 1304 hearing without a lawyer cannot be charged with the knowledge that he has a burden of proof to carry regarding his compliance with the order to pay the fine nor with the understanding of how to satisfy this

burden. Cf., Ridgeway v. Baker, 720 F.2d 1409, 1415 (5th Cir. 1983).

It may be argued that in the circumstances of an indigent appearing before the court at a Sec. 1304 hearing, appointed counsel is unnecessary in light of the Wells decision, since the District Court now knows not to imprison indigents in "civil" contempt proceedings, or at least said courts will follow the Law Court's directive not to imprison indigents in Sec. 1304 hearings. Cf., Ponder v. Ponder, 438 So.2d 541 (Fla. App. 1983).

The fallacy with this approach is that it assumes that a person who is unable to pay for his counsel in necessarily so impoverished that he will also be unable to afford to pay his fine. This assumption will not hold in all cases. Cobb v. Green, 574 F. Supp. 256,

262 (W.D. Mich. 1983). In fact, it may be argued that Colson had sufficient resources to pay his fine, and that the Superior Court's finding that he was indigent was limited to Colson's ability to afford counsel to represent him.

Thus, even a person with a present ability to pay his fine may be indigent enough to require the appointment of counsel if incarceration may be imposed as a result of a Sec. 1304 hearing.

[citations omitted]

This extensive list of authorities indicates the by-now well-recognized due process right to appointed counsel for indigent defendants in "civil" contempt proceedings where imprisonment may result.

E. OPINION OF THE MAINE SUPREME JUDICIAL COURT

COLSON v. STATE

Decision No. 3920

. . . .

... Colson alleges that procedural due process under the Fourteenth Amendment of the United States Constitution and article I, section 6-A of the Maine Constitution requires that an indigent defendant have a right to court-appointed counsel in a hearing necessitated by his failure to pay a fine previously imposed. We affirm the Superior Court's denial of Colson's petition.

. . . .